AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-24 is available for public comments under this procedure. It was requested by William J. McGinley, Esq., Marc Elias, Esq., and Lawrence J. Tabas, Esq., on behalf of the National Republican Senatorial Committee ("NRSC"), the Democratic Senatorial Campaign Committee ("DSCC") and the Republican State Committee of Pennsylvania.

Proposed Advisory Opinion 2006-24 is scheduled to be on the Commission's agenda for its public meeting of Wednesday, October 4, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on October 3, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.
CONTACTS

Press inquiries: Robert Biersack (202) 694-1220
Commission Secretary: Mary Dove (202) 694-1040
Other inquiries:

To obtain copies of documents related to AO 2006-24, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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Rosemary C. Smith
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September 29, 2006

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

J. Duane Pugh
Acting Assistant General Counsel

Margaret G. Perl
Attorney

Robert M. Knop
Attorney

Subject: Draft AO 2006-24

Attached are two proposed alternative drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for October 4, 2006.

Attachment
Dear Messrs. McGinley, Elias and Tabas:

We are responding to your joint advisory opinion request on behalf of the National Republican Senatorial Committee ("NRSC") and the Democratic Senatorial Campaign Committee ("DSCC") (on behalf of the committees themselves and the committees' respective Members who are currently Federal candidates), and the Republican State Committee of Pennsylvania ("State Party"). Your request concerns the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the establishment and administration of funds by Federal candidates' principal campaign committees and the State Party to pay recount and election contest expenses resulting from the upcoming Federal elections on November 7, 2006 ("recount funds"), and the role that the NRSC and DSCC may play in the administration of such recount funds.
The Commission concludes that because election recount activities are in connection with a Federal election, any recount fund established by either a Federal candidate or the State Party must comply with the amount limitations, source prohibitions, and reporting requirements of the Act. In addition, the Commission concludes that the NRSC and DSCC, and their agents, may participate in planning and strategy discussions with a Federal candidate or the State Party regarding the use of their respective recount funds.

Background

The facts presented in this advisory opinion are based on your letter received on August 7, 2006.

NRSC and DSCC Involvement with Recount Funds

The NRSC and DSCC are political committees comprised of sitting Members of the United States Senate of their respective political party and include all incumbent Senators who are currently Federal candidates. The primary function of these political committees is "to aid the election of candidates affiliated with their respective parties," including providing political and financial support and guidance to Federal candidates. The NRSC and DSCC intend to advise their Members in close elections to establish and administer recount funds to be used to finance any recount, election contest or related post-election litigation costs. The NRSC and DSCC also intend to conduct strategy and planning sessions with Federal candidates and State party committees regarding the establishment and administration of recount funds. These sessions will include discussion of how recount funds should be raised and spent, as well as "recount and election contest strategies and tactics."
Federal Candidate Recount Funds

Federal candidates who become involved in recounts intend to establish and administer recount funds through their authorized committees. The Federal candidates will retain all authority over the raising and spending of funds in the recount fund, but will consult with national and State party committee officials regarding fundraising, administrative issues, and strategies and tactics. The Federal candidates and their authorized committees will not solicit or receive any funds from corporations, labor organizations, national banks, or foreign nationals for the recount funds. Money raised by the recount funds will not be used to pay for pre-election or Election Day expenses, such as administrative costs, get-out-the-vote activities or communication expenses. Instead, the recount funds will be used only to pay for “expenses resulting from a recount, election contest, counting of provisional and absentee ballots and ballots cast in polling places,” as well as “post-election litigation and administrative-proceeding expenses concerning the casting and counting of ballots during the Federal election, fees for the payment of staff assisting the recount or election contest efforts, and administrative and overhead expenses in connection with recounts and election contests” (“recount activities”).

The State Party Recount Fund

The State Party is the Republican State party for the Commonwealth of Pennsylvania, and is registered with the Commission as a political party committee. The State Party intends to establish a recount fund to support its Federal candidates by financing recount, election contest and related post-election litigation costs. The State Party will establish and administer the recount fund and will retain all authority over the
raising and spending of the recount fund. The State Party intends to consult with any
Federal candidate who is, or may be, involved in a recount or election contest prior to, on,
and after Election Day. The State Party will also consult with national party committee
officials regarding fundraising, administration, and recount and election contest strategies
and tactics. The State Party will not solicit or receive any funds from corporations, labor
organizations, national banks, or foreign nationals for the recount fund. Prior to or on
Election Day, no money raised by the recount fund will be used to pay for Federal
election activity, as defined in 2 U.S.C. 431(20) and 11 CFR 100.24, coordinated or
independent expenditures, exempt party activities, or any communications referring to
any Federal candidate. All recount funds will be used solely to pay for recount activities,
as described above.

The Pennsylvania Election Code does not limit the amount that may be
contributed with respect to State elections. It does, however, prohibit contributions by
§3253(a). State party committees are required to file reports of receipts, including
specific contributor information, and expenditures with the Secretary of the

Questions Presented

1. Are recount activities conducted by a Federal candidate’s recount fund in
connection with an election for Federal office so that 2 U.S.C. 441i(e)(1)(A)
applies to the recount fund?

   a. What amount limits apply to donations from individuals and political
      committees to a Federal candidate’s recount fund?

   b. How should a Federal candidate’s recount fund report its activities?
c. What are the restrictions, if any, on Federal officeholders or candidates and State party officials raising funds for the Federal candidate's recount fund?

2. Are the State Party's recount activities involving Federal races “in connection with an election for Federal office” so that only Federal funds may be used to pay for these recount activities?

a. What amount limits apply to donations from individuals and political committees to the State Party's recount fund?

b. How should the State Party's recount fund report its activities?

c. What are the restrictions, if any, on Federal officeholders or candidates raising funds for the State Party's recount fund?

d. May the State Party involve a Federal candidate in its decision-making regarding its recount activities and “fully coordinate” recount activities with the Federal candidate?

e. May the State Party's recount fund pay attorney's fees and other litigation costs incurred by a Federal candidate who is a party in a recount or election contest?

f. Are the State law contribution limitations and reporting obligations preempted by the Act and Commission regulations with regard to the State Party's recount fund?

3. May the NRSC and DSCC, and their agents, participate in planning and strategy sessions regarding the establishment, administration, fundraising strategies and recount activities of a recount fund established by a Federal candidate or the State Party?

4. May a Federal candidate or the State Party retain excess funds in the recount funds for future elections, or must the funds be disposed of in some manner?

Legal Analysis and Conclusions

Question 1: Are recount activities conducted by a Federal candidate's recount fund in connection with an election for Federal office so that 2 U.S.C. 441i(e)(1)(A) applies to the recount fund?

Yes, any recount fund established by a Federal officeholder or candidate is subject to 2 U.S.C. 441i(e)(1)(A), and therefore any funds solicited, received, directed,
transferred, or spent are subject to the amount limitations, source prohibitions and
reporting requirements of the Act. This statutory provision applies regardless of whether
the recount fund is established as a separate bank account of a candidate’s authorized
committee or a separate entity.

The Act and Commission regulations define the terms “contribution” and
“expenditure” to include any gift, loan, or payment of money or anything of value for the
purpose of influencing a Federal election. See 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11
CFR 100.52(a) and 100.111(a). Commission regulations promulgated before the
Stat. 81 (2002) (“BCRA”), make exceptions from the cited definitions for gifts, loans, or
payments made with respect to a recount of the results of a Federal election. 11 CFR
100.91 and 100.151. Nonetheless, in recognition of the Act’s prohibitions on
corporations, labor organizations, national banks, and foreign nationals making
contributions or donations “in connection with” Federal elections, see 2 U.S.C. 441b(a)
and 441e(a)(1)(A), these recount regulations expressly bar the receipt or use of funds
prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor
organizations, and national banks). 11 CFR 100.91 and 100.151.

In two advisory opinions, the Commission has addressed the application of pre-
BCRA law to election recounts. First, in Advisory Opinion 1978-92 (Miller), the
Commission concluded that any funds received by a separate organizational entity
established by the candidate’s authorized committee solely for the purposes of funding an
election recount effort would not be subject to the contribution limitations of 2 U.S.C. 441a, and would not trigger political committee status or reporting obligations for the separate election recount entity. The Commission also concluded that the separate recount entity could not accept funds from corporations, labor organizations, and national banks, which were included in 11 CFR 100.4(b)(15). The Commission noted that involvement of current officers and staff of the authorized committee as organizers and principals in a separate election recount entity would not change these conclusions.

In Advisory Opinion 1998-26 (Landrieu), the Commission considered a candidate's principal campaign committee that established, as a wholly separate entity, a contested election trust fund. The Commission concluded that the trust fund was not subject to reporting requirements and could accept amounts in excess of the contribution limitations in 2 U.S.C. 441a, but could not accept funds from prohibited sources, as specified in the predecessors to the recount regulations, 11 CFR 100.7(b)(20) and 100.8(b)(20).

BCRA took effect after these advisory opinions were issued. Under BCRA, Federal candidates and officeholders may not solicit, receive, direct, transfer, or spend funds “in connection with an election for Federal office” unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act (“Federal funds”).

1 These recount regulations recognize that the Act's definition of “election” does not specifically include recounts. See 2 U.S.C. 431(1); see also 11 CFR 100.2. In 2002, these regulations were recodified without substantive change from 11 CFR 100.7(b)(20) and 100.8(b)(20), effective November 6, 2002. See 67 Fed. Reg. 50582 (Aug. 5, 2002). Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). See 45 Fed. Reg. 15080 (Mar. 7, 1980).

2 Advisory Opinion 1978-92 (Miller) cited the then-current recount regulations found at 100.4(b)(15) and 100.7(b)(17). In the 1980 recodification of 11 CFR 100.4(b)(15) and 100.7(b)(17) as 11 CFR 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. See 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).
See 2 U.S.C. 441i(e)(1)(A); see also 11 CFR 300.2(g). These restrictions apply to Federal officeholders and candidates, their agents, and entities directly and indirectly established, financed, maintained, or controlled by, or acting on behalf of, any such candidates or officeholders. Id.; see also 11 CFR 300.60 and 300.61. Congress's choice of the "in connection with" standard in 2 U.S.C. 441i(e)(1)(A) requires the Commission to conclude that section 441i(e)(1)(A) applies to funds raised or spent on recounts of Federal elections. This conclusion flows from the plain language of BCRA, as well as the Commission's recount regulations dating to 1977 that are premised on the conclusion that recounts are "in connection with" Federal elections. See 2 U.S.C. 441b(a), 441e(a)(1)(A); 11 CFR 100.91 and 100.151.

Therefore, 2 U.S.C. 441i(e)(1)(A) prohibits Federal officeholders and candidates, their agents, and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more Federal officeholders or candidates, from soliciting, receiving, directing, transferring, or spending funds for expenses related to a recount of the votes cast in a Federal election, including the recount activities described above, unless those funds are subject to the limitations, prohibitions, and reporting requirements of the Act. Because Federal candidates would directly or indirectly establish, finance, maintain, and control the recount funds under your proposal, 2 U.S.C. 441i(e)(1)(A) applies to the Federal candidates' recount funds.

To the extent that Advisory Opinions 1978-92 and 1998-26 differ from this result, they are superseded.

(a) What amount limits apply to donations from individuals and political committees to a Federal candidate's recount fund?
As discussed above, a Federal candidate's recount fund must not receive or solicit donations in excess of the Act's amount limitations. 2 U.S.C. 441i(e)(1)(A). Thus, by operation of 2 U.S.C. 441i(e), any recount fund established by a Federal candidate may not receive donations that in the aggregate exceed $2,100 per person or $5,000 per multi-candidate political committee.

However, because section 441i(e)(1)(A) does not convert the donations into "contributions" for purposes of 2 U.S.C. 441a, donations to a Federal candidate's recount fund will not be aggregated with contributions from those persons to the Federal candidate for the general election. For these purposes, a recount is similar to a runoff election, which is also subject to a contribution limit separate from the general election contribution limit. Similarly, the aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3) do not apply to an individual's donations to recount funds. Federal candidates may advise prospective donors that donations to recount funds will not be aggregated with contributions from individuals for purposes of the contribution limits for the general election set forth in 2 U.S.C. 441a(a)(1)(A) or (2)(A) or the aggregate biennial contribution limits set forth in 2 U.S.C. 441a(a)(3).

(b) How should a Federal candidate's recount fund report its activities?

A Federal candidate may establish a recount fund either as a separate bank account of the candidate's authorized committee, or as a separate entity. The required reporting does not vary, but the authority for the reporting requirements depends on the organizational option. If the recount fund is a separate account of the Federal candidate's authorized committee, then its receipts and disbursements must be reported on the authorized committee's reports as "other receipts" and "other disbursements." See
11 CFR 104.3(a)(3)(x)(A) and (b)(2)(vi)(A). If the recount fund is a separate entity established by the Federal candidate, then the separate entity must report as an authorized committee under 11 CFR 100.5(d) in order to comply with the reporting obligations under 2 U.S.C. 441i(e)(1)(A). Under 11 CFR 104.3(f), the principal campaign committee must consolidate in its report any other authorized committee’s reports. Therefore, if the recount fund is a separate entity, the Federal candidate’s principal campaign committee must still report the recount fund’s receipts and disbursements as “other receipts” and “other disbursements.”

(c) What are the restrictions, if any, on Federal officeholders or candidates and State party officials raising funds for the Federal candidate’s recount fund?

As a general matter, Federal officeholders and candidates may solicit only funds that are subject to the limitations, prohibitions, and reporting requirements of the Act in connection with a Federal election. See 2 U.S.C. 441i(e). Because any recount fund established by a Federal candidate will comply with the limitations, prohibitions and reporting requirements of the Act, as explained in response to Question 1, Federal officeholders and candidates may solicit funds for the recount fund consistent with this restriction in 2 U.S.C. 441i(e). You specifically ask whether Federal officeholders and candidates may appear as featured guests at fundraising events, participate in pre-event publicity, sign fundraising letters and make telephone solicitations for the recount fund. Such activity would be permissible as long as it is consistent with the restriction in 2 U.S.C. 441i(e). State party officials may also participate in fundraising for a Federal
candidate’s recount fund so long as that fund complies with the amount limitations, source prohibitions and reporting requirements of the Act.  

Question 2: Are the State Party’s recount activities involving Federal races “in connection with an election for Federal office” so that only Federal funds may be used to pay for these recount activities?*  

Yes, payments for recount activities involving Federal races are disbursements in connection with a Federal election. Under 11 CFR 102.5(a)(1)(i) and 300.30(b)(3)(iii), the State Party must use funds in a Federal account to pay for these recount activities. As explained in response to Question 1, although recount funds are not considered “contributions” or “expenditures” under Commission regulations, those funds received or spent for recount activities are spent on activities “in connection with” a Federal election. Pursuant to 11 CFR 102.5(a)(1)(i) and 300.30(b)(3)(iii), all disbursements in connection with a Federal election made by a State party that has both Federal and non-Federal accounts must be made from a Federal account. In addition, only Federal funds may be deposited in a Federal account. See 11 CFR 102.5(a)(1)(i) and 300.2(g). Therefore, a recount fund established by the State Party to conduct recount activities in support of the party’s Federal candidates must be a Federal account containing only Federal funds.  

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3 As explained in response to Question 2(d), consultation and coordination between Federal candidates and State party officials does not result in the making of coordinated party expenditures under the Act.

4 You do not ask, and this advisory opinion does not address recounts and election contests relating solely to State or local candidate races.

5 The only exceptions pertain to disbursements from special allocation accounts. However, recount activities exclusively for Federal elections are not allocable activities.

6 This opinion does not apply to recounts and election contests relating solely to State or local candidate races.
(a) What amount limits apply to donations from individuals and political committees to the State Party's recount fund?

Under 11 CFR 300.30(b)(3)(iii), the State Party's recount fund for recounts of Federal races must comply with the amount limitations in the Act, and therefore may not receive more than $10,000 from a person or $5000 from a multicandidate political committee per calendar year. See 2 U.S.C. 441a(a)(1)(D) and 441a(a)(2)(C). As explained in response to Question 1(a), requiring that this State Party recount fund receive only Federal funds does not convert the donations into "contributions" for purposes of 2 U.S.C. 441a. Consequently, donations to the State Party's recount fund will not be aggregated with contributions from those same donors to the State Party for the calendar year. Similarly, the aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3) do not apply to individuals' donations to recount funds. The State Party may advise prospective donors that donations to the State Party's recount fund will not be aggregated with contributions from the same persons to the State Party in that calendar year, or for the purposes of the aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3).

(b) How should the State Party's recount fund report its activities?

The State Party must establish a separate Federal account to pay for all Federal recount activity. The State Party must report all of the recount fund's receipts and disbursements to the Commission in accordance with 2 U.S.C. 434 and 11 CFR 104.3 because the recount fund is a Federal account of a State party committee.7

7 Your request also asks whether, if the State Party is not permitted to establish a recount fund, the State Party may use its non-Federal account to pay for recount activities. While the State Party may use a non-Federal account to pay for non-Federal recount activities consistent with State law, the State Party may only establish a recount fund for Federal races that is a separate Federal account.
(c) What are the restrictions, if any, on Federal officeholders or candidates raising funds for the State Party's recount fund?

Federal officeholders and candidates may solicit only Federal funds for the recount fund consistent with 2 U.S.C. 441i(e). As explained above in response to Question 1(c), Federal officeholders and candidates may appear as featured guests at fundraising events, participate in pre-event publicity, sign fundraising letters and make telephone solicitations for Federal funds for the State Party's recount fund.

(d) May the State Party involve a Federal candidate in its decision-making regarding its recount activities and "fully coordinate" recount activities with the Federal candidate?

Yes, the State Party may involve a Federal candidate and the candidate's agents in the decisions concerning the State Party's recount fund before, on, and after Election Day.

In addition to Federal candidates, 2 U.S.C. 441i(e)(1)(A) also applies to "an entity ... acting on behalf of 1 or more candidates or individuals holding Federal office." When the State Party "fully coordinates" its recount activities with the Federal candidate whose election is the subject of the recount, the State Party is acting on behalf of that candidate. Consequently, section 441i(e)(1)(A) requires that the State Party spend only funds that are subject to the limitations, prohibitions, and reporting requirements of the Act when paying for these coordinated recount activities. One of these "limitations ... of the Act" referenced in section 441i(e)(1)(A) is the amount limitation that State parties may spend on their candidate under 2 U.S.C. 441a(d).8 Although 11 CFR 100.151 exempts recount

8 In Pennsylvania, that amount is $761,500 for 2006.
activities from the definition of "expenditure," section 441i(e)(1)(A) requires adherence to the amount limitations of 2 U.S.C. 441a(d) without regard to the definition of "expenditure," just as section 441i(e)(1)(A) requires adherence to the amount limitations of 2 U.S.C. 441a(a). However, the State Party would not be required to aggregate amounts spent on coordinated recount activities with any coordinated expenditures for the general election made on behalf of that candidate.

(e) May the State Party's recount fund pay attorney's fees and other litigation costs incurred by a Federal candidate who is a party in a recount or election contest?

Yes, the State Party's recount fund may pay attorney's fees and other litigation costs of a Federal candidate involved in a recount or election contest. The State Party payment for a Federal candidate's legal expenses in connection with a recount would be coordinated recount activity. As explained in response to Question 2(d), the amount limitation in 2 U.S.C. 441a(d)(3) would apply to coordinated recount activity. The State Party should report such payments as disbursements of the Federal recount fund account as explained in response to Question 2(b). ⁹

(f) Are the State law contribution limitations and reporting obligations preempted by the Act and Commission regulations with regard to the State Party's recount fund?

Yes, the Act states that its provisions and the rules prescribed under the Act "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453(a); 11 CFR 108.7(a). The House of Representatives
Administration Committee explained this provision's meaning in sweeping terms, stating that it is intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974).

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on State law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees.

See Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 51 (1977); 11 CFR 108.7(b). As the legislative history of 2 U.S.C. 453 shows, "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal office." Advisory Opinions 2000-23 (New York State Democratic Committee); 1999-12 (Campaign for Working Families); 1988-21 (Wieder).

Section 108.7(b)(3) of the Commission's regulations specifically preempts State laws concerning limitations on contributions made and received by and expenditures.
made by Federal candidates and political committees. See also Advisory Opinion 2000-23 (New York State Democratic Committee). Although receipts and disbursements of the State Party's recount fund are not "contributions" or "expenditures" under the Act, these receipts and disbursements are in connection with a Federal election, and not in connection with any non-Federal election. Thus, such recount funds are subject to the amount limitations and source prohibitions in the Act, preempting the Pennsylvania Election Code, 25 Pa. Stat. Ann. §§ 2600 et. seq. Moreover, because the State Party's recount fund must be a separate Federal account that is not used for non-Federal election spending, the reporting requirements of the Act and Commission regulations preempt the reporting requirements of the Pennsylvania Election Code.

Question 3: May the NRSC and DSCC, and their agents, participate in planning and strategy sessions regarding the establishment, administration, fundraising strategies and recount activities of a recount fund established by a Federal candidate or the State Party?

Yes, the NRSC and DSCC, and their agents, may participate in strategy sessions regarding the raising and spending of these funds on recount activities without violating the Act or Commission regulations, provided that the State Party does not use non-Federal funds to pay expenses related to their participation. As the Supreme Court stated in McConnell v. FEC, 540 U.S. 93, 161 (2003), BCRA "leaves national party committee officers entirely free to participate, in their official capacities, with state and local parties and candidates in soliciting and spending hard money."

National party committees, including NRSC and DSCC, may not solicit, receive, direct or spend "any funds [] that are not subject to the limitations, prohibitions, and
reporting requirements of the Act.” 2 U.S.C. 441i(a)(1); 11 CFR 300.10(a). As the
Explanation and Justification for 11 CFR 100.10 makes clear, this prohibition applies
regardless of whether such funds are “in connection with” a Federal election or for any
other purpose. See Explanation and Justification for Final Rule on Prohibited and
(July 29, 2002) (“[T]he plain language of BCRA, supported by the legislative history,
indicates that the ban on national party raising and spending non-Federal funds was
intended to be broad, prohibiting a party from raising, receiving, or directing to another
person ‘a contribution, donation, or transfer of funds, or any other thing of value’ or
spending ‘any funds’ that are not subject to the Act’s limitations, prohibitions, and
reporting requirements.” (emphasis in original)). Thus, the NRSC and DSCC must pay
for all of the recount activities they conduct using entirely Federal funds.

Question 4: May a Federal candidate or the State Party retain excess funds in
the recount funds for future elections, or must the funds be disposed of in some manner?

You inquire very broadly as to all possible uses of leftover recount funds
including, but not limited to, whether such funds must be disposed of or whether they
may be kept in a separate account for future elections of the same candidate or be
transferred to other political committees. The Commission concludes that this question is
speculative, and a definitive answer depends upon various contingencies that may or may
not occur. This question is, therefore, hypothetical. Commission regulations explain
that requests posing a hypothetical situation, presenting a general question of
interpretation, or regarding the activities of third parties, do not qualify as advisory

Your request also asks what recordkeeping and reporting requirements would apply to excess
recount funds retained for future elections. This question is also hypothetical.
opinion requests. 11 CFR 112.1(b). On this basis, the Commission expresses no opinion
regarding this question. If a Federal candidate or State Party in fact has excess funds in a
recount fund after the election, the candidate or party may wish to resubmit this question
for Commission consideration with specific proposed plans for the excess funds.

This response constitutes an advisory opinion concerning the application of the
Act and Commission regulations to the specific transaction or activity set forth in your
request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
of the facts or assumptions presented, and such facts or assumptions are material to a
conclusion presented in this advisory opinion, then the requestor may not rely on that
conclusion as support for its proposed activity.

Sincerely,

Michael E. Toner
Chairman

Dear Messrs. McGinley, Elias and Tabas:

We are responding to your joint advisory opinion request on behalf of the National Republican Senatorial Committee ("NRSC") and the Democratic Senatorial Campaign Committee ("DSCC") (on behalf of the committees themselves and the committees' respective Members who are currently Federal candidates), and the Republican State Committee of Pennsylvania ("State Party"). Your request concerns the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the establishment and administration of funds by Federal candidates' principal campaign committees and the State Party to pay recount and election contest expenses resulting from the upcoming Federal elections on November 7, 2006 ("recount funds"), and the role that the NRSC and DSCC may play in the administration of such recount funds.
The Commission concludes that because election recount activities are not in connection with a Federal election, any recount fund established by either a Federal candidate or the State Party is permitted to raise and spend unlimited funds from individuals and Federal political committees, provided the funds are not from sources prohibited by 2 U.S.C. 441b or 441e. In addition, the Commission concludes that the NRSC and DSCC, and their agents, may participate in planning and strategy discussions with a Federal candidate or the State Party regarding the use of their respective recount funds.

Background

The facts presented in this advisory opinion are based on your letter received on August 7, 2006.

NRSC and DSCC Involvement with Recount Funds

The NRSC and DSCC are political committees comprised of sitting Members of the United States Senate of their respective political party and include all incumbent Senators who are currently Federal candidates. The primary function of these political committees is “to aid the election of candidates affiliated with their respective parties,” including providing political and financial support and guidance to Federal candidates.

The NRSC and DSCC intend to advise their Members in close elections to establish and administer recount funds to be used to finance any recount, election contest or related post-election litigation costs. The NRSC and DSCC also intend to conduct strategy and planning sessions with Federal candidates and State party committees regarding the establishment and administration of recount funds. These sessions will include
discussion of how recount funds should be raised and spent, as well as "recount and
election contest strategies and tactics."

Federal Candidate Recount Funds

Federal candidates who become involved in recounts intend to establish and
administer recount funds through their authorized committees. The Federal candidates
will retain all authority over the raising and spending of funds in the recount fund, but
will consult with national and State party committee officials regarding fundraising,
administrative issues, and strategies and tactics. The Federal candidates and their
authorized committees will not solicit or receive any funds from corporations, labor
organizations, national banks, or foreign nationals for the recount funds. Money raised
by the recount funds will not be used to pay for pre-election or Election Day expenses,
such as administrative costs, get-out-the-vote activities or communication expenses.
Instead, the recount funds will be used only to pay for "expenses resulting from a
recount, election contest, counting of provisional and absentee ballots and ballots cast in
polling places," as well as "post-election litigation and administrative-proceeding
expenses concerning the casting and counting of ballots during the Federal election, fees
for the payment of staff assisting the recount or election contest efforts, and
administrative and overhead expenses in connection with recounts and election contests"
("recount activities").

The State Party Recount Fund

The State Party is the Republican State party for the Commonwealth of
Pennsylvania, and is registered with the Commission as a political party committee. The
State Party intends to establish a recount fund to support its Federal candidates by
financing recount, election contest and related post-election litigation costs. The State
Party will establish and administer the recount fund and will retain all authority over the
raising and spending of the recount fund. The State Party intends to consult with any
Federal candidate who is, or may be, involved in a recount or election contest prior to, on,
and after Election Day. The State Party will also consult with national party committee
officials regarding fundraising, administration, and recount and election contest strategies
and tactics. The State Party will not solicit or receive any funds from corporations, labor
organizations, national banks, or foreign nationals for the recount fund. Prior to or on
Election Day, no money raised by the recount fund will be used to pay for Federal
election activity, as defined in 2 U.S.C. 431(20) and 11 CFR 100.24, coordinated or
independent expenditures, exempt party activities, or any communications referring to
any Federal candidate. All recount funds will be used solely to pay for recount activities,
as described above.

The Pennsylvania Election Code does not limit the amount that may be
contributed with respect to State elections. It does, however, prohibit such contributions
Ann. §3253(a). State party committees are required to file reports of receipts, including
specific contributor information, and expenditures with the Secretary of the

Questions Presented

1. Are recount activities conducted by a Federal candidate’s recount fund in
connection with an election for Federal office so that 2 U.S.C. 441f(e)(1)(A)
applies to the recount fund?

   a. What amount limits apply to donations from individuals and political
committees to a Federal candidate’s recount fund?
b. How should a Federal candidate's recount fund report its activities?

c. What are the restrictions, if any, on Federal officeholders or candidates and State party officials raising funds for the Federal candidate's recount fund?

2. Are the State Party's recount activities involving Federal races "in connection with an election for Federal office" so that only Federal funds may be used to pay for these recount activities?

   a. What amount limits apply to donations from individuals and political committees to the State Party's recount fund?

   b. How should the State Party's recount fund report its activities?

   c. What are the restrictions, if any, on Federal officeholders or candidates raising funds for the State Party's recount fund?

   d. May the State Party involve a Federal candidate in its decision-making regarding its recount activities and "fully coordinate" recount activities with the Federal candidate?

   e. May the State Party's recount fund pay attorney's fees and other litigation costs incurred by a Federal candidate who is a party in a recount or election contest?

   f. Are the State law contribution limitations and reporting obligations preempted by the Act and Commission regulations with regard to the State Party's recount fund?

3. May the NRSC and DSCC, and their agents, participate in planning and strategy sessions regarding the establishment, administration, fundraising strategies and recount activities of a recount fund established by a Federal candidate or the State Party?

4. May a Federal candidate or the State Party retain excess funds in the recount funds for future elections, or must the funds be disposed of in some manner?

Legal Analysis and Conclusions

Question J: Are recount activities conducted by a Federal candidate's recount fund in connection with an election for Federal office so that 2 U.S.C. 441i(e)(1)(A) applies to the recount fund?
No, recount activities conducted by a Federal candidate's recount fund are not in connection with an election for Federal office. Therefore, the restrictions of 2 U.S.C. 441i(e)(1)(A) do not apply to such a recount fund. However, Commission regulations prohibit donations to a Federal candidate's recount fund from national banks, corporations, labor organizations, and foreign nationals. 11 CFR 100.91 and 100.151.

The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, loan, or payment of money or anything of value made by any person for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Commission regulations first promulgated before the enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), make exceptions from the cited definitions for "a gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election.” 11 CFR 100.91 and 100.151.1

The recount regulations (11 CFR 100.91 and 100.151) are premised on the Commission's interpretation of the statutory term "election" to exclude recounts. See 2 U.S.C. 431(1); see also 11 CFR 100.2. The Act defines elections to include, inter alia, primary, general, special and runoff elections, but it does not include recounts. See 2 U.S.C. 431(1); 11 CFR 100.2. The Commission explained this exclusion when it first promulgated the recount regulations in 1977. "Also excluded from the definition of contribution is a donation to cover the costs of recounts . . ., since, though they are

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1 After BCRA was passed, these regulations were repromulgated and recodified without substantive change from 11 CFR 100.7(b)(20) and 100.8(b)(20), effective November 6, 2002. See 67 Fed. Reg. 50582 (Aug. 5, 2002).

11 CFR 100.91 and 100.151.\(^2\)

In two advisory opinions, the Commission has addressed the application of pre-BCRA law to election recounts. First, in Advisory Opinion 1978-92 (Miller), the Commission concluded that any funds received by a separate organizational entity established by the candidate’s authorized committee solely for the purposes of funding an election recount effort would not be subject to the contribution limitations of 2 U.S.C. 441a, and would not trigger political committee status or reporting obligations for the separate election recount entity. The Commission also concluded that the separate recount entity could not accept funds from corporations, labor organizations, and national banks, which were included in 11 CFR 100.4(b)(15).\(^3\) The Commission noted that involvement of current officers and staff of the authorized committee as organizers and principals in a separate election recount entity would not change these conclusions.

In Advisory Opinion 1998-26 (Landrieu), the Commission considered a candidate’s principal campaign committee that established, as a wholly separate entity, a

\(^2\) Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). See 45 Fed. Reg. 15080 (Mar. 7, 1980). From 1980 to 2002, these regulations appeared at 11 CFR 100.7(b)(20) and 100.8(b)(20).

\(^3\) Advisory Opinion 1978-92 (Miller) cited the then-current recount regulations found at 100.4(b)(15) and 100.7(b)(17). In the 1980 recodification of 11 CFR 100.4(b)(15) and 100.7(b)(17) as 11 CFR 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. See 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).
contested election trust fund. The Commission concluded that the trust fund was not subject to reporting requirements and could accept amounts in excess of the contribution limitations in 2 U.S.C. 441a, but could not accept funds from prohibited sources, as specified in the predecessors to the recount regulations, 11 CFR 100.7(b)(20) and 100.8(b)(20).

BCRA took effect after these advisory opinions were issued. Under BCRA, candidates and Federal officeholders may not solicit, receive, direct, transfer, or spend funds “in connection with an election for Federal office” unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act (“Federal funds”). 2 U.S.C. 441i(e)(1)(A) (emphasis added); see also 11 CFR 300.2(g). BCRA also imposes limitations on the funds Federal candidates may solicit, receive, direct, transfer, or spend “in connection with any election other than an election for Federal office.” 2 U.S.C. 441i(e)(1)(B) (emphasis added).

The Commission’s treatment of recount funds over the past 30 years, based on the rationale that recounts are not “elections,” is well known by Congress. That treatment was first expressed in the 1977 regulations, applied in Advisory Opinion 1978-92, recodified in 1980, and applied again in Advisory Opinion 1998-26. At no point in this period did Congress act to alter the Commission’s approach, although it amended the FECA several times. In 2002, BCRA was enacted with no amendment to the definition of “election” to include recounts. The legislative history offers no indication that Section 441i(e)(1) was intended to apply to recounts. When Congress is aware of an agency’s interpretation of a statute and does not amend that statute, Congress is presumed to accept that interpretation as correct. See, e.g., Lorillard v. Pons, 434 U.S. 575 (1978)
("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Following the enactment of BCRA, the Commission recodified its recount regulations, and specifically reaffirmed that recounts are not "elections." When the Commission reorganized its regulations regarding "contributions" and "expenditures" during the BCRA rulemakings, one "commenter advocated the complete, or at least partial, elimination of the exception to the definitions of 'contribution' and 'expenditure' for recounts and election contests, on the basis that recounts and election contests, which are not Federal elections as defined by the Act, see generally Federal Election Regulations, H.R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977) ... 'serve as an avenue for the use of soft money to influence federal elections,' as evidenced by unregulated contributions used to pay for the 2000 Florida recount." Explanation and Justification for Final Rules on Reorganization of Regulations on "Contribution" and "Expenditure," 67 Fed. Reg. 50582, 50584 (Aug. 5, 2002). In response to this commenter, the Commission specifically stated that "[t]his change is beyond the scope of this rulemaking dealing only with nonsubstantive changes ...." Id. This regulatory history demonstrates two key points. First, the Commission explicitly reaffirmed, post-BCRA, its view that recounts are not "elections" under the law, citing its original 1977 regulation. Second, in reorganizing its regulations, the recount regulation was recodified without substantive change.

Approximately one week earlier, the Commission noted in a different rulemaking that "[t]he exemption for recounts is addressed in the Commission's current rules at 11 CFR 100.7(b)(20) ...." Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49085 (July 29, 2002). The Commission specifically declined to alter that regulation when promulgating the "soft money" rules.
Finally, in its 2004 Legislative Recommendations to Congress, the Commission asked Congress to clarify whether recounts should be subject to 2 U.S.C. § 441i(e)(1). Congress did not act on this request.

In light of the foregoing, the Commission finds its recount regulations at 11 CFR 100.91 and 100.151 to be valid and enforceable and unaffected by BCRA. To conclude otherwise would constitute rewriting our regulation, which, of course, may not be done via the advisory opinion process. See 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title."); 11 CFR 112.4(e).

Thus, recounts are not "elections" under the Act, see 2 U.S.C. § 431(1), so funds solicited, received and spent in connection with a recount are not funds solicited, received or spent in connection with an election, and are therefore not subject to 2 U.S.C. 441i(e)(1). There is no evidence that Congress intended through BCRA to implicitly overturn either the Commission’s longstanding rules or advisory opinions on the treatment of recount funds, and in fact, there is substantial evidence of legislative acquiescence to the Commission’s longstanding treatment of recount funds.

See Legislative Recommendations 2004, available at http://www.fec.gov/pages/legislative_recommendations_2004.html#441ie (visited September 28, 2006) ("The Commission recommends that Congress amend 2 U.S.C. 441i(e)(1) to clarify the circumstances in which recall elections, referenda and initiatives, recounts, redistricting, legal defense funds, and related activities fall within the scope of activities that are "in connection with a Federal election" and are thus subject to the 441i(e)(1) restrictions.").

See also Advisory Opinion 1999-11, Concurring Opinion of Wold, Elliott, and Mason ("[A]dvisory opinions are clearly not rules or regulations. Advisory opinions may address only "the application of [the FECA] ... or a rule or regulation prescribed by the Commission. ... Subsection 437f(b) is an extraordinary restatement of a restriction which is clear from the plain reading of subsections 437f(a) and 438(d): the Commission may not establish a rule of general applicability through the advisory opinion process. ... ").
Consequently, BCRA’s restrictions at 2 U.S.C. 441(e)(1) on Federal candidates soliciting, receiving, directing, transferring, or spending funds in connection with either Federal or non-Federal elections do not alter the Commission’s prior treatment of funds raised and spent by Federal candidates for recounts and recount funds.

(a) What amount limits apply to donations from individuals and political committees to a Federal candidate’s recount fund?

As discussed above, a Federal candidate’s recount fund may accept funds exceeding the Act’s contribution limitations from individuals and political committees, but is barred from accepting funds from corporations, labor organizations, national banks, and foreign nationals under 11 CFR 100.91.

The aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3) do not apply to an individual’s donations to recount funds. Federal candidates may advise prospective donors that donations to recount funds will not be aggregated with contributions from individuals for purposes of the contribution limits for the general election set forth in 2 U.S.C. 441a(a)(1)(A) or (2)(A) or the aggregate biennial contribution limits set forth in 2 U.S.C. 441a(a)(3).

(b) How should a Federal candidate’s recount fund report its activities?

A Federal candidate may establish a recount fund either as a separate bank account of the candidate’s authorized committee, or as a separate entity. If the recount fund is a separate account of the Federal candidate’s authorized committee, then its receipts and disbursements must be reported on the authorized committee’s reports as “other receipts” and “other disbursements,” respectively. See 11 CFR 104.3(a)(3)(x)(A) and (b)(2)(vi)(A). If the recount fund is a separate entity established by the Federal
candidate, then the separate entity is not subject to the Act’s reporting requirements based
on its recount activities. See Advisory Opinions 1998-26 (Landrieu) and 1978-92 (Miller).

(c) What are the restrictions, if any, on Federal officeholders or candidates and State party officials raising funds for the Federal candidate’s recount fund?

As explained in response to Question 1, recounts are not elections under the Act, so funds solicited, received, or spent in connection with a recount are not funds solicited, received, or spent in connection with an election. Consequently, BCRA’s restrictions in 2 U.S.C. 441i(e)(1) on Federal candidates soliciting, receiving, directing, transferring, or spending funds in connection with either Federal or non-Federal elections do not apply to Federal candidates’ recount funds and thus do not alter the prior treatment of amounts raised and spent by Federal candidates on recounts.

However, Federal officeholders, candidates, State party officials, and their agents must comply with the source prohibitions in the Commission’s recount regulations. See 11 CFR 100.91 and 100.151. Because the prohibitions of 11 CFR 110.20 and part 114 apply, Federal officeholders, candidates, State party officials, and their agents may not solicit, accept or receive any donation for a recount fund from a foreign national, national bank, corporation, or labor organization.

Question 2: Are the State Party’s recount activities involving Federal races “in connection with an election for Federal office” so that only Federal funds may be used to pay for these recount activities?

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7 You do not ask, and this advisory opinion does not address recounts and election contests relating solely to State or local candidate races.
No, as explained in response to Question 1, recounts are not “elections” under the
Act, and the funds received and spent in connection with a recount are not funds received
or spent “in connection with an election for Federal office.” Consequently, such funds
are not subject to the requirement that a State party use only Federal funds from its
Federal account to make disbursements in connection with a
Federal election. See 11 CFR 102.5(a)(1)(i), 300.2(g), and 300.30(b)(3)(iii).
Accordingly, the State Party is not required to use Federal funds to pay for these recount
activities.

Thus, the State Party’s recount fund is not subject to the Act’s amount limitations.
However, any recount fund established by the State Party to conduct recount activities in
support of the party’s Federal candidates (not its State candidates) would be subject to the
recount regulations’ source prohibitions, which bar the receipt or use of funds prohibited
by 11 CFR 110.20 (foreign nationals) and 11 CFR Part 114 (corporations, labor
organizations, and national banks). See 11 CFR 100.91 and 100.151. Therefore, the
State Party may pay for recount activities using funds that exceed the Act’s amount
limitations, provided that those funds are not from foreign nationals, corporations, labor
organizations, or national banks. The State Party may set up a separate account to pay for
recount activities, but it is not required to do so. If the State Party does not establish a
separate account, it must use a reasonable accounting method to show that it complies
with the source prohibitions in 11 CFR 100.91. See, e.g., 11 CFR 110.3(b)(4).

(a) What amount limits apply to donations from individuals and political
committees to the State Party’s recount fund?
As explained in response to Question 2, under 11 CFR 100.91, the State Party is permitted to raise funds from individuals and Federal political committees in unlimited amounts for a fund that it will use to finance recount activities arising from a Federal election, provided that the individuals are not foreign nationals. See 11 CFR 100.91 and 100.151.

(b) How should the State Party’s recount fund report its activities?

If the State Party chooses to pay for its recount activities with Federal funds out of its Federal account, then it must comply with the Act’s reporting requirements. See generally 2 U.S.C. 434(b); 11 CFR 104.3. If, instead, the State Party chooses to pay for its recount activities through a separate account or another non-Federal account, then no Federal reporting obligations arise.

(c) What are the restrictions, if any, on Federal officeholders or candidates raising funds for the State Party’s recount fund?

As explained in response to Question 1, BCRA’s restrictions in 2 U.S.C. 441i(e)(1) do not apply to election recount funds. Therefore, Federal officeholders, candidates, and their agents may solicit funds for a State party’s recount fund, which must comply with the source prohibitions in the Commission’s recount regulations. See 11 CFR 100.91 and 100.151.

(d) May the State Party involve a Federal candidate in its decision-making regarding its recount activities and “fully coordinate” recount activities with the Federal candidate?

Yes, the State Party may involve a Federal candidate and the candidate’s agents in the decisions concerning the State Party’s recount fund before, on, and after Election
Day. The FECA, as amended by BCRA, places no restrictions on a Federal candidate’s involvement with recount activity decision making. Furthermore, since expenses for recount activities are not “expenditures,” see 11 CFR 100.151, or campaign materials or electioneering communications, a coordinated contribution cannot result. See 2 U.S.C. § 441a(a)(7)(B).

(e) May the State Party’s recount fund pay attorney’s fees and other litigation costs incurred by a Federal candidate who is a party in a recount or election contest?

Yes, the State Party’s recount fund may pay attorney’s fees and other litigation costs of a Federal candidate involved in a recount or election contest. As explained in response to Question 1, money given with respect to a recount is not a “contribution” or “expenditure” under the Commission’s recount regulations at 11 CFR 100.91 and 100.151. Thus, the State Party payment for a Federal candidate’s legal expenses in connection with a recount would not be an in-kind contribution to the candidate, and no amount limitations would apply. However, as explained in response to Question 2, the source prohibitions in the Commission’s recount regulations would apply. See 11 CFR 100.91 and 100.151.

(f) Are the State law contribution limitations and reporting obligations preempted by the Act and Commission regulations with regard to the State Party’s recount fund?

Yes, the Act states that its provisions and the rules prescribed under the Act “supersede and preempt any provision of State law with respect to election to Federal office.” 2 U.S.C. 453(a); 11 CFR 108.7(a). The House of Representatives Administration Committee explained this provision’s meaning in sweeping terms, stating
that it is intended "to make certain that the Federal law is construed to occupy the field
with respect to elections to Federal office and that the Federal law will be the sole
authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on State law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. See Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 51 (1977); 11 CFR 108.7(b). As the legislative history of 2 U.S.C. 453 shows, "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal office." Advisory Opinions 2000-23 (New York State Democratic Committee); 1999-12 (Campaign for Working Families); 1988-21 (Wieder).

The Commission's recount regulations at 11 CFR 100.91 and 100.151 indicate that the receipts and disbursements of the State Party's recount fund are subject to the source prohibitions in 2 U.S.C. 441b and 441e. Accordingly, the Commission's recount regulations preempt the Pennsylvania Election Code, 25 Pa. Stat. Ann. §§ 2600 et. seq. with respect to recounts of Federal elections.
Question 3: May the NRSC and DSCC, and their agents, participate in planning and strategy sessions regarding the establishment, administration, fundraising strategies and recount activities of a recount fund established by a Federal candidate or the State Party?

Yes, the NRSC and DSCC, and their agents, may participate in strategy sessions regarding the raising and spending of these funds on recount activities without violating the Act or Commission regulations. As the Supreme Court stated in McConnell v. FEC, 540 U.S. 93, 160-161 (2003),

Nothing on the face of § 323(a) [codified at 2 U.S.C. § 441i(a)] prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money. As long as the national party committee officer does not personally spend, receive, direct, or solicit soft money, [BCRA] permits a wide range of joint planning and electioneering activity. Brief for Intervenor-Defendants Sen. John McCain et al. in No. 02-1674 et al., p. 22 ("BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fundraising goals with one another.").

In addition, as explained in response to Question 2(d), the NRSC and DSCC may participate in planning and strategy sessions regarding recount activities of a Federal candidate's or the State Party's recount fund without triggering the Commission's coordinated party expenditure rules. See 2 U.S.C. 441a(d); 11 CFR 109.20 and 109.32.
Question 4: May a Federal candidate or the State Party retain excess funds in the recount funds for future elections, or must the funds be disposed of in some manner?

You inquire very broadly as to all possible uses of leftover recount funds including, but not limited to, whether such funds must be disposed of or whether they may be kept in a separate account for future elections of the same candidate or be transferred to other political committees. The Commission concludes that this question is speculative, and a definitive answer depends upon various contingencies that may or may not occur. This question is, therefore, hypothetical. Commission regulations explain that requests posing a hypothetical situation, presenting a general question of interpretation, or regarding the activities of third parties, do not qualify as advisory opinion requests. 11 CFR 112.1(b). On this basis, the Commission expresses no opinion regarding this question. If a Federal candidate or State Party in fact has excess funds in a recount fund after the election, the candidate or party may wish to resubmit this question for Commission consideration with specific proposed plans for the excess funds.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a

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Your request also asks what recordkeeping and reporting requirements would apply to excess recount funds retained for future elections. This question is also hypothetical.
1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

3 Sincerely,

4 Michael E. Toner
5 Chairman